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Nos. 14-556, 14-562, 14-571 & 14-574

IN THE

Supreme Court of the United States

JAMES OBERGEFELL, ET AL., AND BRITTANI HENRY, ET AL., PETITIONERS,

v.

RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, ET AL., RESPONDENTS.

VALERIA TANCO, ET AL., PETITIONERS,

v.

WILLIAM EDWARD "BILL" HASLAM, GOVERNOR OF TENNESSEE, ET AL., RESPONDENTS.

APRIL DEBOER, ET AL., PETITIONERS,

v.

RICK SNYDER, GOVERNOR OF MICHIGAN, ET AL., RESPONDENTS.

GREGORY BOURKE, ET AL., AND TIMOTHY LOVE, ET AL., PETITIONERS,

v.

STEVE BESHEAR, GOVERNOR OF KENTUCKY, ET AL., RESPONDENTS.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF *AMICUS CURIAE* FOUNDATION FOR MORAL LAW IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Fourteenth Amendment to the United States Constitution prohibits a state from defining or recognizing marriage only as the legal union between a man and a woman.

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE*, FOUNDATION FOR MORAL LAW [1]

Amicus Curiae Foundation for Moral Law (the Foundation), is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the unalienable right to acknowledge God as the moral foundation of our laws; promoting a return to the historic and original interpretation of the United States Constitution; and educating citizens and government officials about the Constitution and the Godly foundation of this country's laws and justice system. To those ends, the Foundation has filed amicus briefs in cases concerning the right of counseling students to disapprove of homosexuality, public display of the Ten Commandments, the recitation of the Pledge of Allegiance and prayer, partial-birth abortion and others.

The Foundation has an interest in this case because it believes that this nation's laws should reflect the moral basis upon which the nation was founded, and that the ancient roots of the common law, the pronouncements of the legal philosophers from whom this nation's Founders derived their view of law, the

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[1] Pursuant to this Court's rule 37.3, all respondents have given blanket consent to the filing of this brief, and all appellants have specifically consented to the filing of this brief. Further, pursuant to Rule 37.6, these *amici curiae* state that no counsel for any party authored this brief in whole or in part, and no party and no counsel for a party made any monetary contribution intended to fund the preparation or submission of this brief. No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief.

views of the Founders themselves, and the views of the American people as a whole from the beginning of American history at least until very recently, have held that homosexual conduct is immoral and should not be sanctioned by giving it the official state sanction of marriage.

The Foundation is interested in this case because a similar lawsuit has been filed challenging Ala. Amendment 774, Ala. Sanctity of Marriage Amendment (2006), which was approved by Alabama voters 81% - 19% in 2006. David Fancher, an Alabama resident who was in a same-sex relationship with Paul Hard, died in a vehicle accident August 1, 2011. Hard has sued the State of Alabama, arguing that Alabama's Sanctity of Marriage Amendment is unconstitutional and that he is therefore the lawful spouse of David Fancher and is entitled to one-half of Fancher's estate. The mother of David Fancher does not want her son's name used to advance the cause of same-sex marriage, and she has retained the Foundation for Moral Law to represent her interests. The federal district court has granted her motion to intervene, and the decision of this Court concerning the Sixth Circuit cases will very likely affect the outcome of our Alabama case.

The State of Alabama, Mr. Hard, and Ms. Fancher have all filed separate motions for summary judgment which are pending before the District Court. *See Hard v. Bentley*, Civ. Action No. 2-13-cv-00922-WKW-SRW (2013).

SUMMARY OF ARGUMENT

As Chief Justice John Marshall wrote for this Court in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819), "We must never forget, that it is a constitution we are expounding." *Amicus* urges this Court to apply

the first principles of constitutional law in this case and to embrace the plain and original text of the Constitution, the supreme law of the land. U.S. Const. art. VI.

The Sixth Circuit ruling is consistent with this Court's ruling in *United States v. Windsor*, 123 S. Ct. 2675 (2013). In that case, this Court struck down several provisions of the federal Defense of Marriage Act (DOMA), 1 U.S.C. § 7, declaring that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States." *Windsor*, 2691 (quoting *In re Burris*, 136 U.S. 586, 593-94 (1890)). The supreme irony of this case is that the proponents of same-sex marriage law have been now using this very decision (*Windsor*) to persuade the federal courts to strike down numerous state marriage laws and force the states to adopt a marriage policy favored by certain federal judges. If *Windsor* is to have any status in its own right as an exposition of constitutional law rather than merely a milestone on the journey toward forcing same-sex marriage upon all fifty states, this Court should affirm the Sixth Circuit decision and explain the true meaning of *Windsor*.

This Court can uphold the marriage laws of the states in the Sixth Circuit without contradicting this Court's ruling in *Windsor*. This Court can recognize what Justice Kennedy in *Lawrence v. Texas*, called "choices central to personal dignity and autonomy" and "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Lawrence* at 574, quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992), and at the same time recognize that this right does not require strict or intermediate

scrutiny. This Court could conclude that there is, as Justice Blackmun said in his *Bowers v. Hardwick*, 478 U.S. 186 (1986), dissent, "the right to be let alone," at 199, but that this general right to be let alone does not merit strict or intermediate scrutiny except for a few narrow areas of activity. *Lawrence* indeed decriminalized homosexual conduct, but decriminalizing it is a far cry from sanctioning same-sex relationships by giving them the honored status of marriage.

This Court should be most reluctant to give heightened scrutiny to the right to same-sex conduct, and even more the right to same-sex marriage, because that right would have been unthinkable to the overwhelming majority of Americans, as well as to most legal scholars and other professionals, only a few decades ago, and the public and the professionals are still sharply divided on this issue today. Some believe constitutional interpretation should reflect changing social mores. But if so, the change in social mores should come from the people and work its way upward through the local, state, and federals of government through the elected representatives of the people. Such changes should not be imposed from the top down by the federal judiciary, especially in the absence of a clear constitutional provision. As the Alabama Supreme Court said in a per curiam opinion in *Ex parte State of Alabama ex rel. Alabama Policy Institute, Ala. Citizens Action Program, and John E. Enslen, in his official capacity as Judge of Probate for Elmore County*, Case No. 1140460, decided (March 3, 2015) pp.16-17:

> Thus it is for the stability and welfare of society, for the general good of the public, that a proper understanding and preservation of the institution of marriage is critical. It is the people themselves,

not the government, who must go about the business of working, playing, worshiping, and raising children in whatever society, whatever culture, whatever community is facilitated by the framework of laws that these same people, directly and through their representatives, choose for themselves. It is they, who on a daily basis must interact with their fellow man and live out their lives within that framework, who are the real 161140460 stakeholders in that framework and in the preservation and execution of the institutions and laws that form it. There is no institution more fundamental to that framework than that of marriage as properly understood throughout history.

ARGUMENT

I. THE CONSTITUTIONALITY OF MARRIAGE LAWS SHOULD BE DETERMINED BY THE TEXT OF THE CONSTITUTION, THE SUPREME LAW OF THE LAND.

Few if any current issues are as fraught with emotion, as well as with sincere religious and moral conviction, as homosexuality and same-sex marriage. The American people, state and local governmental entities, and state and federal courts are confused and conflicted as to what they should do and what the Constitution allows or requires them to do.

It is therefore vitally important that this Court affirm the Sixth Circuit ruling and ensure that judicial pronouncements reflect the Constitution rather than emotion or ideological positions.

The Constitution itself and all federal laws pursuant thereto are the "supreme Law of the Land." U.S. Const. art. VI. All judges take their oaths of office

to support *the Constitution* itself—not a person, office, government body, or judicial opinion. *Id.* The Constitution and the solemn oath thereto should control, above all other competing powers and influences, the decisions of federal courts.

As Chief Justice John Marshall observed, the very purpose of a *written* constitution is to ensure that government officials, including judges, do not depart from the document's fundamental principles. "[I]t is apparent that the framers of the constitution contemplated that instrument, as a rule of government of *courts* . Why otherwise does it direct the judges to take an oath to support it?" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179-80 (1803).

James Madison insisted that "[a]s a guide in expounding and applying the provisions of the Constitution . . . the legitimate meanings of the Instrument must be derived from the text itself." Madison, Letter to Thomas Ritchie, September 15, 1821, in 3 *Letters and Other Writings of James Madison* (Philip R. Fendall, ed., 1865). "The object of construction, applied to a constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself." *Lake County v. Rollins*, 130 U.S. 662, (1889). A textual reading of the Constitution, according to Madison, requires "resorting to the sense in which the Constitution was accepted and ratified by the nation" because "[i]n that sense alone it is the legitimate Constitution." Madison, Letter to Henry Lee (June 25, 1824), in *Selections from the Private Correspondence of James Madison from 1813-1836*, (J.C. McGuire ed., 1853).

> As men whose intentions require no concealment, generally employ the words which most directly

> and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.

Gibbons v. Ogden, 22 U.S. 1, 188 (1824). The words of the Constitution are neither suggestive nor superfluous: "In expounding the Constitution . . . every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added." *Holmes v. Jennison*, 39 U.S. (14 Peters) 540, 570-71 (1840).

This Court affirmed this approach in *South Carolina v. United States*, 199 U.S. 437, 448 (1905), declaring that "The Constitution is a written instrument. As such, its meaning does not alter. That which it meant when it was adopted, it means now." The Court reaffirmed this approach in *District of Columbia v. Heller*, 554 U.S.570, 128 S. Ct. 2783, (2008):

> [W]e are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *United States v. Sprague*, 282 U.S. 716, 731 (1931); *see also Gibbons v. Ogden*, 9 Wheat. 1, 188 (1824).

The meaning of the Constitution is not the province of only the most recent or most clever judges and lawyers: "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them." *Heller*, 128 S. Ct. at 2821.

Moreover, if the Constitution as written is not a fixed legal standard, then it is no constitution at all. By adhering to court-created tests rather than the legal text, federal judges turn constitutional decision-making on its head, abandon their duty to decide cases "agreeably to the constitution," and instead mechanically decide cases agreeably to judicial precedent. *Marbury*, 5 U.S. at 180; *see also*, U.S. Const. art. VI. James Madison observed in *Federalist No. 62* that,

> [i]t will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes, that no man who knows what the law is today, can guess what it will be tomorrow.

James Madison, *The Federalist No. 62*, at 323-24 (George W. Carey & James McClellan eds., 2001). "What distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle." *McCreary County, Ky. v. ACLU of Kentucky*, 545 U.S. 844, 890-91 (2005) (Scalia, J., dissenting). The constitutional text should be the basis for the judicial analysis in this and all other cases.

This Court should affirm the Sixth Circuit ruling to ensure that court rulings in this vital and controversial issue are decided according to the Constitution rather than according to emotion or individual ideological preferences.

II. STATE LAWS AND CONSTITUTIONAL PROVISIONS WHICH DEFINE MARRIAGE AS A UNION OF ONE MAN AND ONE WOMAN DO NOT VIOLATE THE PRIVILEGES AND IMMUNITIES CLAUSE, THE DUE PROCESS CLAUSE, OR THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT, AS INTERPRETED BY THIS COURT IN LAWRENCE V. TEXAS AND UNITED STATES V. WINDSOR.

This Court held in *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885):

> Certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate States of the Union, than that which seeks to establish it on *the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy state of matrimony*; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement." (emphasis added)

United States v. Windsor, 133 S.Ct. 2675 (2013), continues this emphasis on states' rights by striking down several provisions of the federal Defense of Marriage Act 1 U.S.C. § 7, declaring that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States." *Windsor*, 2691 (quoting *In re Burris*, 136 U.S. 586, 593-94).

The supreme irony of this case is that proponents of same-sex marriage are now using this very decision (*Windsor*) to persuade the federal courts to strike down state marriage laws and force the states to adopt a marriage policy favored by some federal courts. If *Windsor* is to have any status at all in its own right as a constitutional decision rather than merely another milestone on the journey toward forcing same-sex marriage upon all fifty states, this Court should stand on the language of *Windsor*, explain the true meaning of *Windsor*, and affirm the ruling of the Sixth Circuit.

This Court can uphold the marriage laws of the states in the Sixth Circuit while following Justice Kennedy's reasoning in *Windsor*. This Court can do so by simply ruling that the regulation of marriage is a matter traditionally left to the states, that the states' same-sex marriage policies require only rational-basis analysis, and that states have a rational basis for their same-sex marriage policy.

Likewise, this Court can uphold state marriage laws without overruling or modifying the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003). Although *Lawrence* is commonly cited as legalizing homosexual activity, the decision is actually much narrower than is commonly supposed. As the Court said at 578,

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.

It would appear that the language of *Windsor* and *Lawrence* was carefully crafted to preserve the option to stop short of a full recognition of a right to same-sex marriage. Saying, as the Court did in *Lawrence*, that the state may not prohibit private homosexual activities, is far different from saying that the state must give such activities the official status and recognition of marriage. Saying, as the Court did in *Windsor*, that Congress may not impede states that choose to legalize same-sex marriage, is far different from saying all fifty states must adopt a uniform policy of legalized same-sex marriage. And saying, as the Court did in *Lawrence*, that one has "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life," and concluding that this right includes the right to be left alone to do whatever one wants to do, is far different from saying this right is entitled to the heightened protection of strict scrutiny or intermediate scrutiny.

Before taking such a revolutionary step, this Court should consider the history and meaning of marriage, the many state benefits associated with marriage, the unique role of religion in marriage, and many other factors. It is one thing to take a practice that is nowhere mentioned in the Constitution or the Fourteenth Amendment and that was strongly disapproved at the time the Constitution was adopted and equally disapproved when the Fourteenth Amendment was adopted and extend to that practice constitutional protection. It is far different to suddenly elevate that practice to the status of a preferred constitutional right and accord to it strict or intermediate scrutiny.

The role of the Court is to *expound* the Constitution, not to *expand* the Constitution. Before taking such a drastic and revolutionary step, the Court should

consider the nature of equal protection historically through the present.

A. "All men are created equal" and as either male or female.

An analysis of "equal protection" should at least start with the foundation of the American concept of created equality. The "birth certificate" of the United States and the first document in our organic law asserts the self-evident truth that "all men are created equal, [and] that they are endowed by their Creator with certain unalienable rights." *Declaration of Independence* (1776). These rights were recognized by the Declaration, but they did not originate with it: "The sacred rights of mankind are not to be rummaged for, among old parchments, or musty records. They are written, as with a sun beam, in the whole volume of human nature, *by the hand of the divinity itself*; and can never be erased or obscured by mortal power." Alexander Hamilton, *The Farmer Refuted*, (February 23, 1775) (emphasis added). Such rights are natural, unalienable, and are defined by God:

> Those rights then which God and nature have established, and are therefore called natural rights, such as are life and liberty, need not the aid of human laws to be more effectually invested in every man than they are; neither do they receive any additional strength when declared by the municipal laws to be inviolable. On the contrary, no human legislature has power to abridge or destroy them, unless the owner shall himself commit some act that amounts to a forfeiture.

1 William Blackstone, *Commentaries on the Laws of England* 54 (1765).

Although we are "created equal," we are not created all the same, *i.e.*, with the same talents, skills, strength, beauty, personalities, wealth, etc. Rather, this equality speaks to our standing before the law as equal bearers of rights. But He Who created us with such rights defines the limits of those rights. We are told in Genesis that "God created man in His own image, in the image of God He created him; male and female He created them. . . . For this reason a man shall leave his father and his mother, and be joined to his wife; and they shall become one flesh." Genesis 1:27, 2:24 (King James Version).

The law of the Old Testament enforced this distinction between the sexes by stating that "[i]f a man lies with a male as he lies with a woman, both of them have committed an abomination." Leviticus 20:13 (KJV). At creation, therefore, the sexes were established as "male and female" and *"[f]or this reason,"* marriage was defined at its inception as a union between a man and his wife. Genesis 2:18-25. Only the male-female marriage is inherent in the same created order that gives us our legal equality before the law, as recognized in the Declaration of Independence. The Bible has been considered the authoritative source of morality and worldview for Western civilizations for nearly two millennia (three millennia for the Tanakh or Old Testament), including the time period in which the institutions of American law and government were established.[2] The concept of being

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[2] See, for example, *Hebrew and the Bible in America: The First Two Centuries*, Shalom Goldman, ed. (Hanover: University Press of New England 1993); Eran Shalev, *American Zion: The Old Testament as a Political text from the Revolution to the Civil War* (New Haven: Yale University Press 2013); Michael Novak, *On Two Wings: Humble Faith and Common Sense at the American Founding*, (San Francisco: Encounter Books 2002);

"created equal" cannot be properly understood without a recognition of "the laws of nature and of nature's God" upon which the concept of equality depends.

B. Rightly or wrongly, homosexual conduct was, at least until recently, strongly disapproved in most cultures and in Anglo-American law, and opinion remains sharply divided today.

Prohibitions against homosexual conduct go back to ancient times. The Bible, which has influenced moral values for Judaism, Christianity, Islam, and other religions, contains clear disapproval of homosexual conduct in the Old Testament (Leviticus 18:22) and in the New Testament (Romans 1:26-27).[3] Among the Romans, homosexual conduct did exist, but homosexual acts were capital offenses under the Theodosian Code (IX.7.6) and under the Justinian Code (IX.9.31). In the Middle Ages, St. Thomas Aquinas, a preeminent disciple of natural-law theory, called homosexuality "contrary to right reason" and "contrary to the natural order." St. Thomas Aquinas, 4 *Summa Theologica, Secunda Secundae*, Quest. 154, Art. 11 (Benziger Bros. Press 1947).

The English common law maintained similar provisions. Sodomy was codified by statute as a serious crime early in England. "The earliest English secular

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John Eidsmoe, *Historical and Theological Foundations of Law* (American Vision /Tolle Lege 2012); John Eidsmoe, *Christianity and the Constitution: The Faith of Our Founding Fathers* (Grand Rapids: Baker Book House 1987).

[3] Although recently certain writers have tried to reinterpret these and other passages, throughout most of history Jews, Christians, and Muslims have interpreted them as prohibiting and/or disapproving homosexual conduct.

legislation on the subject dates from 1533, when Parliament under Henry VIII classified buggery (by now a euphemism for same-sex activity, bestiality, and anal intercourse) as a felony. Penalties included death, losses of goods, and loss of lands." Vern L. Bullough, *Homosexuality: A History* 34 (New American Library 1979). Sir Edward Coke, the "Dean of English Law," called homosexuality "a detestable, and abominable sin, amongst Christians not to be named, committed by carnal knowledge against the ordinance of the Creator, and order of nature, by mankind with mankind, or with brute beast, or by womankind with brute beast." "At common law 'sodomy' and the phrase 'infamous crime against nature' were often used interchangeably." Raymond B. Marcin, *Natural Law, Homosexual Conduct, and the Public Policy Exception*, 32 Creighton L. Rev. 67 (1998).

Sir William Blackstone—of whose *Commentaries on the Laws of England* (1765) Justice James Iredell said in 1799 that "[F]or near 30 years [it] has been the manual of almost every student of law in the United States"[4] —wrote in his *Commentaries* concerning homosexual conduct:

> IV. WHAT has been here observed, especially with regard to the manner of proof [for the crime of rape], which ought to be the more clear in proportion as the crime is the more detestable, may be applied to another offense, of a still deeper malignity; the infamous crime against nature, committed either with man or beast. A crime,

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[4] U.S. Supreme Court Justice James Iredell, *Claypool's American Daily Advisor*, April 11, 1799 (Philadelphia) 3; *Documentary History of the Supreme Court of the United States, 1789-1800, at 347* (Maeva Marcus, ed., Columbus University Press 1990).

> which ought to be strictly and impartially proved, and then as strictly and impartially punished. But it is an offense of so dark a nature, so easily charged, and the negative so difficult to be proved, that the accusation should be clearly made out: for, if false, it deserves a punishment inferior only to that of the crime itself.
>
> I WILL not act so disagreeable part, to my readers as well as myself, as to dwell any longer upon a subject, the very mention of which is a disgrace to human nature. It will be more eligible to imitate in this respect the delicacy of our English law, which treats it, in its very indictments, as a crime not fit to be named; "*peccatum illud horribile, inter christianos non nominandum*" ["that horrible crime not to be named among Christians"]. A taciturnity observed likewise by the edict of Constantius and Constans: "*ubi scelus est id, quod non proficit scire, jubemus insurgere leges, armari jura gladio ultore, ut exquisitis poenis subdantur infames, qui sunt, vel qui futuri sunt, rei.*"

The "crime against nature" was prohibited in many of the colonial law codes. When the Constitution was adopted, homosexual conduct was prohibited either by statute or by common law in all thirteen states. *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986). When the Fourteenth Amendment was adopted, homosexual conduct was prohibited in 32 of 37 states, and during the twentieth century it was prohibited in all states until 1961. *Id.* at 192-3.

In light of this history, it is inappropriate for the lower federal courts to take this newly-discovered right to engage in homosexual conduct and require the

states to not only permit it but also give it the honored status of marriage.

C. Same-sex "marriage" was inconceivable in Anglo-American common law.

Defenders of marriage who seek to review ancient and common-law texts for support of their position do not easily find written sources stating "two men or two women cannot marry" because it was, to those early writers, as unnecessary and obvious as saying that men cannot bear children. Rather, the common law assumes the only definition of marriage is a union between one man and one woman. In Blackstone's *Commentaries*, Chapter 15 of Volume I ("Of the Rights of Persons") is simply titled "Of Husband and Wife," in which is discussed the "second private relations of persons . . . that of marriage, which includes the reciprocal duties of *husband and wife*. . ." 1 *Commentaries* 421 (emphasis added). Blackstone notes that some legal disabilities prohibit a marriage as "void *ab initio*, and not merely voidable: not that they dissolve a contract already formed, but they render the parties incapable of forming any contract at all." *Id.* at 423-4. The first of these legal disabilities is "having another husband or wife living; in which case, besides the penalties consequent upon it as a felony, the second marriage is to all intents and purposes void: *polygamy being condemned both by the law of the new testament, and the policy of all prudent states*." *Id.* at 424 (emphasis added). If the aforementioned prohibition on polygamous marriages was rooted in the New Testament of the Bible and in international law, then especially considering the strong condemnation of homosexual activity, *a fortiori*, a "marriage" between two men or two women would be void *ab initio* at common law.

Almost 60 years after the publication of Blackstone's *Commentaries*, Noah Webster's *American Dictionary of the English Language* (1828) defined marriage as follows:

> MAR'RIAGE, n. [L. mas, maris.] The act of uniting a man and woman for life; wedlock; *the legal union of a man and woman for life*. Marriage is a contract both civil and religious, by which the parties engage to live together in mutual affection and fidelity, till death shall separate them. . . .Noah Webster, *American Dictionary of the English Language* (Foundation for American Christian Educ. 2002) (1828).[5]

Marriage at common law was defined as only between one man and one woman because there was and is no other definition of marriage. The family is the fundamental unit of society. Marriage is the foundation of the family. There is no institution in a civilized society in which the public has any greater interest. As Justice Joseph Story wrote,

> The contract of marriage is the most important of all human transactions. It is the very basis of the whole fabric of civilized society.

Joseph Story, *Commentaries on the Conflict of Laws Foreign and Domestic* § 109 (3d ed. 1846).

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[5] Noah Webster was a close associate of many of the Convention delegates, frequently dined with some of them in the evenings after sessions of the Convention, and at their request wrote an essay urging ratification of the Constitution. Harlow Giles Unger, *Noah Webster: The Life and Times of an American Patriot* (John Wiley & Sons 1998).

The U.S. Supreme Court agreed:

> [Marriage] is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.

Maynard v. Hill, 125 U.S. 190, 211 (1888). It "creat[es] the most important relation in life, . . . having more to do with the morals and civilization of a people than any other institution." *Id.* at 205. *Maynard* further stated, at 211-12 (quoting *Adams v. Palmer,* 51 Me. 480, 484-85 (1863):

> [Marriage] is not then a contract within the meaning of the clause of the constitution which prohibits the impairing the obligation of contracts. It is rather a social relation like that of parent and child, the obligations of which arise not from the consent of concurring minds, but are the creation of the law itself, a relation the most important, as affecting the happiness of individuals, the first step from barbarism to incipient civilization, the purest tie of social life, and the true basis of human progress.

Again quoting Story, supra, at sec. 111:

> [M]arriage is a contract sui generis, and the rights, duties, and obligations which arise out of it, are matters of so much importance to the wellbeing of the State, that they are regulated, not by private contract, but by the public laws of the State, which are imperative on all, who are domiciled within its territory.

According to one observer, marriage is a "prepolitical" "natural institution" "not created by law," but nonetheless recognized and regulated by law in every

culture and, properly understood, an institution that must be preserved as a public institution based on the following rationale: "The family is the fundamental unit of society. . . . [F]amilies . . . produce something that governments need but, on their own, they could not possibly produce: upright, decent people who make honest law-abiding, public-spirited citizens. And marriage is the indispensable foundation of the family." Robert P. George, *Law and Moral Purpose, First Things*, (January 2008), http://www.firstthings.com/article/2008/01/001-law-and-moral-purpose (last visited April 1, 2015) *see also* Sherif Girgis, Robert P. George & Ryan T. Anderson, *What is Marriage?, 34 Harv. J.L. & Pub. Pol'y* 245, 270 (2011) (discussing the bases for laws supporting "conjugal" or "traditional" marriage and noting that 151140460 "[m]arriages . . . are a matter of urgent public interest, as the record of almost every culture attests — worth legally recognizing and regulating. Societies rely on families, built on strong marriages, to produce what they need but cannot form on their own: upright, decent people who make for reasonably conscientious, law-abiding citizens. As they mature, children benefit from the love and care of both mother and father, and from the committed and exclusive love of their parents for each other. . . . In the absence of a flourishing marriage culture, families often fail to form, or to achieve and maintain stability)."

III. BECAUSE OF THIS HISTORY, THE JUDICIARY SHOULD EXERCISE RESTRAINT AND NOT MAKE SAME-SEX MARRIAGE A CONSTITUTIONALLY-MANDATED RIGHT.

Abraham Lincoln is said to have asked a man, "How many legs does a dog have?" "Four." Lincoln then asked, "But if we call the tail a leg, then how many legs

does a dog have?" The man answered, "Well, then he'd have five legs." "No," Lincoln said, "he would still have four. Calling a tail a leg does not make it a leg."[6]

The District Court below has engaged in a sleight-of-hand known in logic as the fallacy of definition: The Court recognized that marriage is a fundamental right. The Court then redefined marriage to include same-sex unions. The Court then announced that the right to enter into same-sex unions is a fundamental right to be accorded strict scrutiny.

But calling a same-sex union a marriage does not make it a marriage, any more than calling a tail a leg means a dog has five legs.

The District Court's application of *Loving v. Virginia*, 388U.S. 1 (1967)[7], is therefore inappropriate. At that time Virginia law prohibited interracial marriage. But Virginia did not deny that an interracial marriage was a marriage; rather, it was a prohibited kind of marriage. By contrast, same-sex unions are outside the very concept of what marriage is, a union of a man and a woman. By all traditional concepts and definitions, a same-sex union is not a marriage at all. As the Supreme Court acknowledged in *Windsor* at 2675, ". . .marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to

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[6] *Reminiscences of Abraham Lincoln by Distinguished Men of His Time*, ed. Allen Thorndyke Rice (New York: Harper & Brothers Publishers, 1909), 241-42. By some accounts including this one, Lincoln used the example of a calf rather than a dog.

[7] *Loving* at 12 said marriage is one of the "basic civil rights of man," because it is fundamental to our very existence and survival. The Court would not have said same-sex marriage is fundamental to our very existence and survival.

its role and function throughout the history of civilization."

Amicus has presented the Biblical, historical, and common law background of marriage, not to persuade the Court that *Lawrence* and *Windsor* were erroneous and should be overruled. Rather, *Amicus* has presented this background to ask the Court to consider that, because homosexual conduct was generally illegal and regarded as immoral, a sudden judicial decision elevate this practice not only to a basic privacy right but also to the preferred status of a strict or intermediate scrutiny right that the states are required to endorse, sanction and approve by giving it the revered status of marriage, would be an unprecedented step of judicial activism.

Forcing states to recognize same-sex marriages in effect forces the states to make statements they do not want to make, to endorse what they do not want to endorse, to approve same-sex marriage as moral, healthy, and wholesome for children and adults, when in fact those states and the majority of the people thereof believe and want to say the opposite.

The Supreme Court recently confronted a similar divisive issue: physician-assisted suicide. In *Washington v. Glucksberg*, 521 U.S. 702 (1997). Chief Justice Rehnquist wrote for the Court that "for over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide," *Id. at syllabus of the Court*, but that in recent years attitudes were being re-examined. Nevertheless, the Court upheld Washington's ban on physician-assisted suicide, concluding at 735:

> Throughout the Nation, Americans are engaged in an earnest and profound debate about the

> morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society.

Amicus believes the courts should do the same with same-sex marriage. Even if, public acceptance of homosexuality, like public acceptance of physician-assisted suicide, has risen in recent decades, but the public is still sharply divided on whether homosexual activity is moral or immoral, healthy or unhealthy, safe or dangerous, and experts are similarly divided. The public and the experts are still sharply divided on whether children fare better in heterosexual vs. homosexual homes and on whether or not same-sex marriage would have long-term detrimental consequences for society.

If this Court reverses the decision of the Sixth Ciruit, the debate will be closed before the issues are resolved. Same-sex marriage will be the nationally-mandated policy of all fifty states regardless of whatever negative consequences may result.

Before taking that plunge, we should consider words of warning from distinguished scholars of the not-too-distant past. Dr. J.D. Unwin (1895-1936), ethnologist and social anthropologist at Oxford University and Cambridge University, undertook an exhaustive study of eighty primitive tribes and six advanced civilization through 5,000 years of history. Those he studied included island people of Melanesia and Polynesia, tribes in Africa and Central America, Paleo-Siberians, Native Americans of the Northwest, the Plains, the Great Lakes, the South, and the Southeast, as well as the Babylonians, the Athenians, the Romans, the Anglo-Saxons, and the modern English. In 1934 he published his findings in a 619-page book titled *Sex*

and Culture.[8] Dr. Unwin concluded that the most successful societies, those which advanced most rapidly and retained their advanced state, were those which restrained sexual energy by heterosexual monogamous marriage. He wrote that "if the male as well as the female is compelled to confine himself to one sexual partner, the society begins to display some expansive energy. It bursts over the boundaries of its habitat, explores new countries, and conquers less energetic peoples."[9] He also noted, however, that "We must remember that no change in the sexual opportunity of a society produces its full effect until the third generation."[10]

Similarly, Dr. Carle E. Zimmerman, Professor of Sociology at Harvard University, studied various types of family structures throughout history: the trustee family in which the marital union is considered sacred, immortal, and absolute; the domestic family in which the marital union is strong but retains more freedom; and the atomistic family in which marriage is merely a contract for the parties' mutual benefit. Dr. Zimmerman compared societies of the ancient world, the medieval period, up to the modern period, and published his findings in *Family and Civilization.*[11] He concluded that there is a general regression from the trustee family to the domestic family to the atomistic family structure, and that

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[8] J.D. Unwin, *Sex and Culture* (London: Oxford University Press 1934).

[9] *Id.* 428.

[10] *Id.* 429.

[11] Carle C. Zimmerman, *Family and Civilization* (New York: Harper 1947; Wilmington: ISI Books 2007).

when the atomistic family structure becomes prevalent, social cohesion suffers.

Such words of warning by eminent scholars should not be disregarded. Time must be given to see whether their forecasts are accurate.

And a more recent study has focused on the more immediate consequences of same-sex unions. Dr. Paul Cameron, Ph.D., Kay Proctor, M.Ed., and Dr. Kirk Cameron, Ph.D. have formed the Family Research Institute (FRI). Working through the FRI, Drs. Cameron have conducted extensive scientific research on homosexuality and its effects on the individual, the family, and society. Drs. Cameron compiled data from nearly twenty scholarly sources each with its own focus ranging from academic success to sexual abuse.[12]

They concluded that the homosexual lifestyle has several very negative consequences. For example: the statistics of that case study show that homosexual parents, as compared to straight parents, were five times more likely to have harmed their children through neglect, seduction, emotional distress, or instability.[13]

The Cameron study is unique in that it represents an exhaustive effort to research appeals cases involving child custody because this data represents "the only study of homosexual parenting indexing testimony under oath, subject to the winnowing effects of cross-examination, opposition by an informed

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[12] Cameron, Paul Ph.D, *Gay Marriage Against Children's Interests*, p. 5, Family Research Institute, (2015).

[13] Paul Cameron, Ph.D, *Gay Marriage Against Children's Interests*, p. 1, Family Research Institute (2015).

opponent, and supervision by a judge."[14] Drawing from perhaps the most legitimate pool of data on this particular issue, the cases studied by Drs. Cameron showed that "[h]omosexuals were held responsible for 111 (97%) of the 115 listed harms to children." [15]

Startling as they may be, the Camerons' conclusions are well-founded. Addressing the academic impact of same-sex parenting, Drs. Cameron cite a study based on "large census samples from both the U.S. and Canada" which reported that children raised by homosexual parents were about 35% less likely to graduate from High School on time.[16] To further dispel any argument of bias, the Cameron case study also incorporated reports by parents themselves. According to the U.S. National Health Interview Survey, (NHIS) children of same-sex parents "had poorer emotional health (17.4% [compared to] 7.4%) . . . had more learning problems . . . 19.3 [compared to] 10.2 . . [and received more] therapy or special education 17.8 [compared to] 10.4."[17] This is based on data collected from homosexual parents themselves.[18]

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[14] Cameron p. 1.

[15] Cameron at 1 (classifying 'harms' as "[parental] neglect, seduction, emotional distress, or instability").

[16] *See* Cameron at 3 (citing Allen D High school graduation rates among children of same-sex households. Rev Econ Househ 11 (4): 635-58 (2013) (explaining that Children living with gay and lesbian families in 2006 were about 65 % as likely to graduate compared to children living in opposite sex marriage families.")

[17] *See Cameron*, at 4 (citing D. Paul Sullins, *Emotional problems among children with same-sex parents: difference by definition*, Brit. J. of Ed., Soc. & Behav. Sci. 7 (2):99-120 (2015), *available at* http://www.sciencedomain.org/abstract.php?id=21&aid=8172

[18] *Id.*

This certainly does not mean that every homosexual is a poor parent. But it does suggest that children brought up in homosexual families are much more likely to face serious mental, physical, and emotional challenges.

The Cameron study also suggests that the homosexual lifestyle is unhealthy and not conducive to longevity. Drs. Cameron and Cameron compiled 1,388 consecutive obituaries of homosexuals who had at least one child, published in homosexual publications in the Washington D.C. over two periods, 1988-1992 and 1993-1994:

> The gay parents ranged in age at death from 30 to 69 with a median age of 48, while the lesbian parents ranged in age at death from 32 to 74 with a median of 44.5. A similar compilation of 1,552 homosexual obituaries from 2000-2014 in San Francisco after widespread introduction of HIV antiretroviral therapy (ART) yielded parents listed among 6% of 1,461 gay obituaries and 20% of 91 lesbian obituaries. Gay fathers ranged in age at death from 36 to 90 with median age of 60, while lesbian mothers ranged in age at death from 47 to 86 with median age of 70.[19]

In contrast, Drs. Cameron say, as of 2010, the Centers for Disease Control (CDC) estimated mean life expectancy at 76.2 years for men in general and 81 for women in general, and married men and women live even longer on the average.[20]

Amicus presents these statistics, not out of any animus toward homosexuals, but out of concern that

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[19] Cameron p. 2.

[20] Cameron p. 2.

there may be unhealthy aspects of the homosexual lifestyle, both for adults and for their children, and consequently the states should be hesitant about sanctioning same-sex unions by giving them the official status of marriage.

And in the face of such statistics, Amicus suggests that the Court be cautious about redefining marriage for the nation, because the interests of children and adults will be directly affected. In *Jacobson v. Massachusetts,* 197 U.S. 11 (1905), a case involving compulsory vaccination of children, this Court held that the state police power includes authority to legislate for the common good including public health and safety, and that when legislators are presented with conflicting evidence from conflicting authorities, they have substantial discretion to determine which evidence and which authorities are most persuasive. Recognizing that experts differed from one another on the effectiveness of vaccination, Justice Harlan wrote for this Court at 30:

> We must assume that, when the statute in question was passed, the legislature of Massachusetts was not unaware of these opposing theories, and was compelled, of necessity, to choose between them. It was not compelled to commit a matter involving the public health and safety to the final decision of a court or jury.

Likewise, the legislators of Michigan, Ohio, Kentucky, Tennessee, and the other 46 states are authorized to make policies that promote the public health and safety of their children and adult citizens without being second-guessed by a federal district court.

Even the full legal fall-out from the decision of the Tenth Circuit and other courts cannot yet be measured. On 27 August 2014 U.S. District Judge Clark Waddoups finalized an earlier ruling declaring a portion of Utah's polygamy ban – a ban that Congress had required Utah to include in its state constitution as a pre-condition for statehood – unconstitutional.[21] It is of course too early to determine the final outcome of this case, but if the rationale for recognizing same-sex marriage as a constitutional right is accepted, a ban on polygamy (or other unions) may be difficult to defend.

On the other hand, in the State of Tennessee Roane County Circuit Judge Russell E. Simmons, Jr., has rejected the suggestion that *Windsor* requires states to recognize same-sex marriages and has therefore refused to grant a divorce to two men who had gone through a marriage ceremony in Iowa. See *Borman v. Pyles-Borman*, No. 2014-CV-36 (Cir. Ct. Roane County, Tenn., August 5, 2014).

If the American people are moving toward full acceptance of same-sex marriage, that revolution should come from the bottom up, through the elected voices of the people at the local, state, and federal levels. It should not be imposed upon them from the top by the federal judiciary, especially in the absence of a clear constitutional provision requiring it.

By affirming the decision of the Sixth Circuit, this Court can allow the debate to continue, and hopefully with time the best wisdom will prevail.

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[21] *Brown et al. v. Herbert et. al*, Case 2:11-cv-00652-CW Memorandum Decision and Judgment filed 08/27/14.

CONCLUSION

Marriage is more than a private act; it is a civil and religious institution that involves child welfare, child-rearing, income tax status (individual, joint, or separate tax returns; deductions; credits) estate and inheritance tax considerations, testamentary rights, privileged communications (husband-wife privilege), Social Security and Medicare benefits, military housing allowances, and a host of other matters.

Justice Frankfurter once wisely wrote, "[T]he ultimate touchstone of constitutionality is the Constitution itself and not what we have written about it." *Graves v. O'Keefe*, 306 U.S. 466, 491-92 (1939) (Frankfurter, J. concurring). As in any case, the proper solution here is for this Honorable Court to fall back to the supreme law of the land, the text of the Constitution.

For the foregoing reasons, *Amicus* respectfully urges this Court to affirm the decision of the Sixth Circuit and uphold the marriage laws of Michigan, Ohio, Tennessee, Kentucky, and the other states of this nation.

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